New Associates d/b/a Hospitality Care Center *and* 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board. Cases 22–CA–17250 and 22–CA–17402

July 6, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 19, 1991, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New Associates d/b/a Hospitality Care Center, Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We correct the following errors in the judge's decision: in fn. 6, the case number should be 22–CA–17402; and in sec. III, par. 25, the available dates in the Union's letter were December 26, 1990, and January 2, 3, and 9, 1991.

Renee Crain, Esq., for the General Counsel.
Morris Tuchman, Esq., of New York, New York, for the Respondent.
Gary P. Rothman, Esq. and *Richard Greenspan, P.C.*, of White Plains, New York, for the Charging Party.

DECISION

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by 1115 Nursing Home & Hospital Employees Union, a Division of 1115 Joint Board (the Union or Local 1115), the Regional Director for Region 22 issued an order consolidating cases, consolidated complaint and notice of hearing on January 31, 1991, alleging that New Associates d/b/a Hospitality Care Center (Respondent) violated Section 8(a)(1) and (5) of the Act by in substance failing to notify the Union of the names of new hires, failing to make fund contributions as required by its collective-bargaining agreement, failing and refusing to supply the Union with relevant information, and by failing and refusing to meet and bargain with the Union since on or about September 1990.[1]

The hearing with respect to the issues raised by the complaint was heard before me in Newark, New Jersey, on March 18, 1991.[2] A memorandum has been submitted by Respondent and has been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with a place of business in Newark, New Jersey (the Newark facility), has been engaged in the operation of a nursing home providing inpatient medical and professional care services. During the calendar year ending December 31, 1990, Respondent in the course and conduct of its operations, derived gross revenues in excess of $100,000 and purchased and received at its Newark facility goods and materials valued in excess of $5000 directly from points located outside the State of New Jersey.

Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS

At all times material, the Union has been recognized by Respondent as the exclusive bargaining representative of Respondent's employees in an appropriate unit, consisting of all employees, excluding nurses, and various other categories of employees and supervisors. Such recognition has been embodied in various collective-bargaining agreements, the most recent of which was effective by its terms from February 4, 1988, to August 13, 1991.

On May 1, 1990, the Union sent a letter, signed by Paul Aldrich, its secretary-treasurer to Respondent, exercising pursuant to the terms of the contract, its right to reopen and negotiate wages and conditions of employment.[3] Respondent admits that it received this correspondence from the Union.

Aldrich and Nathaniel Hall, the Union's divisional coordinator, both testified that the Union sent another letter, also dated May 1, 1990, to Respondent, signed by Aldrich, requesting the names of all employees covered by the agreement, along with their current home addresses, dates of hire, categories, and wage rates. Respondent denied receipt of this document, and although it was allegedly sent by certified mail, return receipt requested, no return receipt establishing receipt was introduced at trial.

Sidney Schiff, Respondent's administrator, denied ever receiving the second May 1 letter, requesting names and ad-

[1] All dates herein, unless otherwise specified are in 1990.

[2] At the outset of the hearing, Respondent amended its answer to raise an affirmative defense of deferral to arbitration to the allegations of par. 9(b) of the complaint, alleging a refusal to make fund contributions, since April 1990. Both General Counsel and Charging Party agreed on the record to the deferral of this allegation. Respondent also confirmed on the record its admission as to par. 9(a) of the complaint, alleging a failure to notify the Union, since April 1990 of all new hires, as required by the contract.

[3] The contract provides for such reopening 90 days prior to the expiration of the third year of the agreement.

dresses. In this connection, it is noteworthy that Schiff sent a letter to Aldrich, dated May 10, which acknowledges receipt of the first letter, regarding the request for negotiations, but made no reference to the second letter, requesting names and addresses.

However, Hall testified that he had a number of telephone conversations with Schiff during the month of May and June, wherein he (Hall) in addition to discussing negotiation dates, told Schiff and asked him about the list of employees that the Union had previously requested. Significantly, Schiff did not deny having these discussions with Hall concerning both letters. Schiff's response was that he ''probably'' did have conversations in May 1990 with Hall, but he did not remember what was said by either party.

Particularly, in view of Schiff's uncertain and evasive testimony, I credit Hall that he had a number of conversations with Schiff in May and June during which he reiterated the requests made by the Union in its May 1 letter for the list of names, addresses, and the information requested therein. Therefore, I need not decide whether Respondent actually received the letter in the mail that the Union sent on May 1.

Both Aldrich and Hall testified to various reasons why the Union needed to have the information requested. Aldrich asserted that the Union wanted the names of employees so that it could know which employees were in the unit so that it could facilitate their joining the Union. As for addresses, the Union needed to be able to communicate with the employees to make them aware of their benefits and inform them of the membership process. The dates of hire, wage rates, and classifications of employees were needed, according to Aldrich, to facilitate the Union's ability to determine their eligibility for fringe benefits and raises and to sign people into the Union.

Hall testified that the Union needed the information in order to properly formulate the Union's demands for bargaining.

Respondent never supplied these items of information requested by the Union, nor did any of its witnesses furnish any explanation as to why it did not do so. Respondent did elicit under cross-examination of General Counsel's witnesses, that some of the information requested by the Union could have been obtained by the Union by resort to various provisions in the contract, such as the requirement that Respondent submit monthly reports, and notify the Union of new employees. Moreover, the contract also authorizes the Union to conduct an audit of Respondent's payroll records, in order to determine compliance with fringe benefit payments by Respondent to the Union's various funds, wherein it was admitted that some of the information requested by the Union could be ascertained.

On June 1, the Union sent a letter to Respondent, signed by Grossberg Miranda, business representative, accompanied by a list of demands for a new agreement. The list requests wage increases for each year of the new proposed agreement, including a raise of $20 per week on 8/13/90, plus other increases in benefits. The letter also suggests two dates in June for possible negotiation sessions.

After a number of telephone conversations between Schiff and Miranda and Hall, it was agreed to commence negotiations on July 11, at Respondent's facility. In addition to July 11, the parties met twice more, the last meeting occurring on August 9. Miranda represented the Union at the first two sessions by himself, and was joined by Hall at the August 9 session. Schiff and Respondent's attorney Peter Schneider represented Respondent.

At each meeting, Respondent rejected the Union's demands, and explained to the Union that due to problems that it was having in obtaining reimbursement from the State, it needed to have a total wage freeze for the first year of the contract.[4] Respondent also asked for reductions in benefits for new employees. At one of the meetings, the Union lowered its wage demands for the third year of the contract, and reduced its demands for contributions to the Union's funds, also for the third year of the contract.

Respondent continued to press for a first year wage freeze and relief for new hires in general. The Union responded, by Hall, that the Union couldn't give Respondent any relief for the new hires, unless it put something on the table for the first year.

Respondent continued to refuse to offer any increases in the first year, and at one point Schneider offered the Union the opportunity to inspect Respondent's records. The union representatives made no response to Schneider's offer at that time.

During the course of the August 9 meeting, Hall asked the Respondent's representatives for the list of bargaining unit employees, addresses, dates of hire, and classifications that it had previously requested. At that point, Schneider bent over and whispered something to Schiff, who in turn whispered something in return. Schneider then told Hall that Respondent still did not have the list for him.

With respect to the substance of the negotiations, Schneider continued to take the position that Respondent must have a first year freeze. He added that Respondent was not able to change this position, ''today or tomorrow.'' Hall stated that the Union was prepared to stay as long as necessary to negotiate a contract, and asked Respondent for additional dates for negotiations. Schneider replied that he had no additional dates to give at that time. The meeting ended with no agreements reached other than on the duration of the contract, and with no agreement on additional dates for subsequent negotiations.

After this meeting, Hall reported to his superior Aldrich, that the last meeting was a ''waste of time.'' Hall informed Aldrich that due to the financial situation of the facility, Respondent stated that it could not provide any increases in wages or benefits.

Shortly, after the last meeting, Aldrich spoke to Jack Rosen, Respondent's owner. Rosen told Aldrich that the facility was losing money, had never produced any profits, and that he had left matters in the hands of his attorney to proceed in the way that the attorney felt was best for the home.

Shortly thereafter, Aldrich contacted Schneider by phone. Aldrich asked Schneider again for the list of names, addresses, classifications, and dates of hire, and reminded Schneider of the importance of having the list. Schneider replied that he would speak to his client about the matter and get back to Aldrich. Aldrich also discussed with Schneider Respondent's position at the negotiations that it was not able to give any increases. Aldrich then asked Schneider to permit the Union to audit Respondent's financial records. Schneider re-

[4] Respondent proposed that the Union could move to reopen the contract in the succeeding years for discussion of wage increases.

sponded that he would check with the ''owner'' (Rosen) and Aldrich will be contacted. Aldrich testified that because of Respondent's position that it could not afford to pay any increases, the Union needed to verify Respondent's financial condition by auditing its financial records.

At negotiations, the Union received no responses from Respondent with respect to either the request for the list of employees, or Aldrich's request for a financial audit of Respondent's records.

On or about September 7, the Union sent a strike notice to the Respondent, scheduling a strike for September 17. On September 11, as a result of communications from the executive director of the New Jersey State Board of Mediation, and from Wellington Davis, the mediator assigned to the case, the Union postponed the strike. Aldrich sent a telegram on that date to the Mediation Board and to Respondent, indicating the Union will accede to the direction of the Board to postpone the strike until Davis has had an opportunity to meet with the parties.

Thereafter, the Union attempted to arrange for further negotiation sessions but was unsuccessful. Aldrich spoke to Rosen in late September and asked about going back to the bargaining table. Rosen responded that he had attorneys handling this for him and he didn't want to get involved. Rosen added that he would discuss Aldrich's request with his attorney. Aldrich received no further response to this request from either Rosen or his attorney.[5]

At some point, not specifically disclosed by the record, an RD petition was filed by an employee. The charge in Case 22–CA–17250 was filed by the Union on September 12, and alleges a refusal to make contributions to the Union's funds and a refusal to submit accurate lists of employees to the Union. A complaint and notice of hearing was issued by the Region on October 26, alleging that Respondent refused to supply relevant information since May 1, 1990. On November 8, 1990, a first amended complaint was issued, adding allegations that Respondent failed to notify the Union of names of new employees, and failed to make fund contributions.

On December 3, Aldrich instructed the Union's controller, Ronald Germana, to contact Respondent and request whatever financial records he would need to ascertain the financial position of the home. Germana called Schiff on that date, and asked for a copy of Respondent's audited financial statements for the past several years. Schiff replied that he would contact Respondent's lawyer and get back to the Union. Schiff did not get back to Germana or the Union.[6] About a week later, Germana reported to Aldrich, that he had requested the financial information from Respondent, and had not received anything, nor had he heard from Respondent's officials about the matter.

On December 14, not having heard from Respondent, Aldrich sent a letter to Schiff reflecting that Respondent had indicated it was financially unable to agree to wage increases. The letter adds that ''the Union again requests that it be allowed to examine the Employer's financial records. Our previous demand has been ignored.'' On the same date, Aldrich sent a letter to Davis, the mediator, with a copy to Respondent and their new attorney. The letter acknowledges receipt of Davis' earlier letter to Respondent's attorney, and asserts that the Union ''has always been available to meet for negotiations and we await confirmation of the following available dates: December 26, 1990 and January 23 and 9, 1991.'' The Union has not received any written responses to either of these letters, nor any response at all with respect to its request for negotiations.

On December 17, Schiff telephoned Aldrich. Schiff asked for a clarification concerning the Union's request for an audit of Respondent's records. Schiff asked whether this letter referred to previous letters from various union officials concerning a prior audit that had been conducted. Aldrich replied that this letter had nothing to do with the prior audit, that the Union was looking for new information which related to the negotiations. Aldrich explained to Schiff that the Union was requesting financial records of Respondent to show whether they were losing or making money. Schiff informed Aldrich that he would reply to the Union's request.

Schiff testified that after this conversation with Aldrich, he was still confused about what the Union wanted and whether the requests were related to the prior audit. Thus, he sent a letter dated December 19, in which he asked for clarification of the Union's request, particularly whether the previous demand referred to in Aldrich's December 14 letter, was a response to a letter from Michael Sackman to Respondent.

In this connection, the Union and Respondent had a series of correspondences regarding a payroll audit of Respondent's records, under the contract, in order to obtain compliance with payments to the Union's funds. The audit was conducted by the Union in June. On September 5, the Union sent a letter signed by Michael Sackman, general president of the Union, indicating that an audit had been conducted, and that certain shortages had been detected, which were set forth on an attached work sheet. The letter asked Schiff to respond within 10 days.

Schiff sent a letter in response, dated September 12. This letter acknowledges receipt of Sackman's letter and asserts that the audit and its findings were in the process of being reviewed.

It was this September 5 letter from Sackman that Schiff asserts he believed may have been referred to in Aldrich's letter of December 14. Aldrich did not respond to Schiff's letter of December 19, seeking clarification of Aldrich's prior letter.

Notwithstanding Schiff's testimony that he was confused about the meaning of Aldrich's letter, even after Aldrich's oral clarification, Schiff concedes that Respondent has refused to supply the Union financial records, because ''we are at impasse in negotiations at this point in time.'' When asked when Respondent came to that conclusion, Schiff responded that because Respondent received the strike notice, and the RD petition[7] was filed, it was concluded by Respondent that it did not have to furnish the financial records to the Union, and that it would no longer agree to any further bargaining sessions.

[5] Aldrich, prior to this discussion with Rosen, had spoken to Respondent's attorney about negotiations but couldn't get a definite answer from the attorney about the matter.

[6] In the interim, on December 6, the Union filed a charge in Case 22–CA–12701, alleging a refusal to meet and bargain with the Union since August 9.

[7] Schiff testified that because of the petition, ''there might be an election.''

Further, Schiff admitted that the Union had, through the mediator, asked for additional bargaining sessions, but that Respondent declined, ''because of the petition.'' Indeed, Schiff testified that Respondent's attorney sent a letter to Davis, to that effect, but this letter was not introduced into the record herein.

While Schiff admitted that he was aware that the Union had lifted its strike notice, he still insisted that an impasse still existed, because of the petition.

In any event, the Respondent never responded directly to the Union's demand for additional negotiations, and insofar as this record discloses, has never indicated to the Union that it considers or considered the parties at an impasse, and never asserted to the Union that the existence of an ''impasse'' was a reason for its failure to furnish records or its refusal to attend any further bargaining sessions.

The foregoing description of the relevant events herein is based on a compilation of the credited testimony of Hall, Aldrich, Germana, and Schiff. Much of the testimony of the General Counsel's witnesses is undisputed or undenied, particularly since neither Rosen nor Schneider testified, and Schiff's testimony is replete with his failures to recall or remember details of or even the existence of some of the conversations related above. Insofar as there are any direct contradictions between the testimony of Schiff, and the General Counsel's witnesses, I have generally credited the latter's versions, primarily because of the uncertainty and evasiveness of Schiff's testimony as a whole.

IV. ANALYSIS

A. *The Alleged Failure to Make Fund Contributions*

The parties have all agreed that paragraph 9(b) of the amended complaint, which alleges a failure to make fund contributions on behalf of employees by Respondent, since April 1990, should be deferred to the parties' arbitration procedures. *Collyer Insulated Wire*, 192 NLRB 837 (1971). In view of such agreement by all parties, I shall recommend dismissal of this allegation of the complaint, with the standard recommendation to retain jurisdiction of this allegation, for the limited purpose of entertaining an appropriate motion for further consideration of these allegation.

B. *The Alleged Failure to Notify the Union of Names of New Employees*

Paragraph 9(a) of the amended complaint alleges that since April 1990, Respondent has failed to notify the Union of the names of all new employees hired into the unit, as required by the collective-bargaining agreement between the parties.

Respondent admitted Section 9(a) in its answer, and reaffirmed that admission during the course of the hearing. However, in its brief, Respondent urges for the first time that this allegation also be deferred to the parties' arbitration procedure, since in its view the pending arbitration on the failure to make fund payments ''will clearly resolve the issue as well.'' I do not agree.

Initially, I would note that Respondent has made no showing or introduced any evidence that the arbitration will or even might remedy this allegation of the complaint.

More importantly, Respondent did not raise this defense in its answer or at the hearing, and the issue was not litigated therein. Thus, the record provides no basis for determining whether deferral is appropriate, and Respondent's attempt to raise the issue in its brief to me is untimely, and must be rejected. *Southwestern Bell Telephone Co.*, 276 NLRB 1053, 1055 (1985); *Jack Thompson Oldsmobile*, 256 NLRB 24 (1981); *MacDonald Engineering Co.*, 202 NLRB 748 (1973).

Moreover, I would also note that Respondent has admitted in its answer that it has failed to notify the Union of new employees as required by the contract, the provision is clear and unambiguous[8] and Respondent has not demonstrated that a construction of the contract is necessary to evaluate the reasons for Respondent's noncompliance. In these circumstances, deferral to arbitration is inappropriate, even if it had been timely raised by Respondent. *Struthers Wells Corp.*, 245 NLRB 1170, 1171 (1979), enfd. 636 F.2d 1210 (3d Cir. 1980); *Griffith Hope Co.*, 275 NLRB 487, 501 (1985).

Accordingly, based on the foregoing, Respondent's request to defer this portion of the complaint is denied.

Since Respondent has admitted that it has since April failed to inform the Union, as required by the contract, of the names and addresses of new hires, its conduct in this regard is clearly violative of Section 8(a)(1) and (5) of the Act. *Scott Lee Guttering Co.*, 295 NLRB 497 (1989); *Nick Robolitto, Inc.*, 292 NLRB 1279 (1989); *St. Agnes Medical Center*, 287 NLRB 242, 258 (1985).

C. *The Alleged Refusal to Supply Relevant Information to the Union*

It is well settled that an employer has a statutory obligation to provide a Union with relevant information that a Union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial*, 385 U.S. 431 (1967). The type of information requested by the Union herein, i.e., names, addresses, wage rates, dates of hire, and job classifications of employees, is presumptively relevant to the Union's role as bargaining agent of Respondent's employees, and no showing of particularized need was necessary. *Safelite Glass*, 283 NLRB 929, 948 (1987); *15th Avenue Iron Works*, 279 NLRB 643, 657 (1986); *Bozzuto's, Inc.*, 275 NLRB 353 (1985).[9]

Indeed, Respondent does not contest the relevance of the information requested, and its principal defense, which I have in effect rejected above, is that the Union never made the request. As noted, I have concluded that regardless of whether Respondent received the May 1 request sent by the Union, that the Union made a number of oral demands on Respondent's officials in May and June, and again at the last negotiation session on August 9, for the submission of the information requested in the May 1 letter.

Respondent also argues that even if requested, the information was adequately provided. *Old Line Life Insurance*, 96 NLRB 499 (1951), affd. 200 F.2d. 52 (7th Cir. 1952); *Cincinnati Steel*, 86 NLRB 592 (1949); *Albany Garage*, 126 NLRB 417 (1969); *California Portland Cement*, 101 NLRB 1436 (1952). However, in the cases cited by Respondent, the Employers either offered to or in fact did supply all the re-

[8] The contract provides that Respondent must promptly furnish each month the names, home addresses, dates of hire, categories, and wages of all new employees in the bargaining unit.

[9] I note that notwithstanding the absence of a necessity for the Union to show a need for the information, both Aldrich and Hall testified to why the Union needed the information.

quested information to the Union, albeit in a different form. That is not the case herein. Respondent relies on the audit conducted by the Union in June in order to determine compliance with the fund provisions of the contract. However, the weekly payroll records provided to the Union's auditors did not contain the dates of hire, addresses of employees, or the job classifications for all of Respondent's employees as requested by the Union.

Respondent also makes reference to the monthly remittance reports submitted by Respondent, as well as other contractual provisions which give the Union the right to demand audits and inspections of records, and which obligate Respondent to supply monthly to the Union the same information requested by the Union herein.

However, the monthly remittance reports also did not contain much of the information requested by the Union, and are insufficient to meet Respondent's obligations to supply current information to the Union. *Safelite Gas*, supra at 948. Respondent's reliance on the clauses in the contract requiring it to supply the Union the information requested is disingenuous at best, and frivolous at worst. As Respondent conveniently ignores, Respondent has not been complying with this contractual obligation since April, an action which I had previously found to be violative of Section 8(a)(5) of the Act.

Respondent's further argument that the Union's rights under the contract to this information, and to obtain relief by an action for damages or arbitration, precludes the finding of a violation, is without merit. It is clear that an Employer may not refuse to furnish relevant information to the Union on the grounds that the Union has an alternative source or method of obtaining the information; *Public Service Corp. of Colorado*, 301 NLRB 238 (1991); *Washington Hospital Center*, 270 NLRB 396, 401 (1984); *Kroger Co.*, 226 NLRB 512–514 (1976). The Union is under no obligation to utilize a burdensome procedure (such as utilizing its rights under the contract), of obtaining desired information where the employer may have such information available in a more convenient form. *Kroger*, supra at 513.

Accordingly, Respondent's defenses all having been rejected, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to provide to the Union relevant information.

D. *The Alleged Failure to Supply Financial Records*

It is well established, and not disputed by Respondent, that where an employer, either in response to bargaining demands from the Union, or in support of its proposals, makes a claim of inability to pay, the employer is required to provide, on request, financial information to the Union to substantiate its claim. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). *Clemson Bros., Inc.*, 290 NLRB 944 (1988).

Respondent does not contest and I find that it clearly pleaded an inability to pay in connection with its refusal to accept the Union's demands and in support of its own proposal for a wage freeze and other contractual relief for new hires.

Respondent raises a number of defenses to its refusal to supply such financial information to the Union, all of which singly or collectively are without merit. Respondent initially points to the fact that it, through its attorney, offered the Union the opportunity to inspect its records at the August 9 meeting, even prior to the Union's request. However, this fact provides no solace for Respondent, since when the Union subsequently requested the information, both orally and in writing, in effect accepting Respondent's offer, Respondent refused to comply.

Respondent also argues that it was confused by Aldrich's December letter requesting the records, and that it did not know whether the Union was referring to the previous audit conducted by the Union or a different demand for financial records. I find Schiff's testimony in this regard to be unconvincing, particularly in view of Aldrich's unequivocal explanation to Schiff that his present demand for financial records was clearly different in purpose and nature from the previous audit. In any event, regardless of any alleged confusion from Aldrich's December letter, or his failure to respond to Schiff's written request for further clarification, in fact Schiff conceded that Respondent was aware that the Union was seeking financial records and that Respondent had decided not to turn them over.

This brings me to Respondent's principal and most strongly argued defense, that the parties were at impasse after the August 9 meeting. Thus, Respondent contends that once at impasse exists, the duty to bargain with the Union, including the obligation to turn over information or financial records is suspended. Respondent has cited no case in support of this rather novel proposition of law, and in my view the assertion is incorrect. While a genuine impasse may relieve an employer of the obligation to bargain with the union about the subject matter of the impasse, *Providence Medical Center*, 243 NLRB 714 (1929), or even to meet further with the union, *Civic Motor Inns*, 300 NLRB 774 (1990), unless changed circumstances indicate that future bargaining may be fruitful, the obligation to supply relevant information is not affected. Indeed, such a result would be contrary to the rationale of the foregoing cases. Thus, an impasse if it exists, can only be broken by a changed circumstance indicating that there may be a change of position by either party. The receipt and review of the financial records by the Union, could very well convince the Union that Respondent's pleas of poverty were valid, and persuade it to lower its demands or agree to Respondent's proposal of a freeze.

Accordingly, I reject Respondent's contention that even if impasse existed on August 9,[10] as it contends, its obligation to furnish financial records is suspended. Therefore, I find that its failure to turn over these records is violative of Section 8(a)(1) and (5) of the Act.

E. *The Refusal to Meet*

There is no dispute but that Respondent after the August 9 meeting refused to meet or attend any further bargaining sessions with the Union. Respondent, as noted, asserts that an impasse was reached in bargaining by the close of that session, over the issue of Respondent's alleged insistence on a 1 year freeze, thereby permitting Respondent to refuse to meet and bargain with the Union, unless the Union gave some indication of flexibility on that issue.

However, it is well settled that a failure to supply information relevant and necessary for bargaining constitutes a failure to bargain in good faith and precludes a finding of a genuine impasse. *Pertec Computer Co.*, 288 NLRB 810 (1987);

[10] I shall deal below with the question of whether an impasse existed as asserted by Respondent.

Cowin & Co., 277 NLRB 802, 817 (1985). Here I have concluded that Respondent failed and refused to comply with the Union's request for relevant information made in its numerous requests in May and June, and most significantly repeated and again refused by Respondent at the August 9 meeting, after which Respondent contends the impasse existed. Therefore, no valid impasse was reached at that or any other time, and Respondent was obligated to continue bargaining.

I would also note Respondent's refusal to supply its financial records to substantiate its inability to pay, which I have also found to be violative of Section 8(a)(1) and (5) of the Act. While Respondent is correct in observing that these requests and refusals occurred after the August 9 meeting, when Respondent asserts that the impasse was reached, this fact does not prevent the consideration of the unlawful refusal in assessing the lawfulness of its refusal to meet with the Union. Respondent's refusal to supply the records to substantiate its claims of financial distress, prevented the Union from authenticating these claims, and seriously diminished the chances of breaking any ''alleged'' impasse that may have existed. Therefore, in my view, Respondent cannot rely on the existence of an impasse to justify refusing to meet further, while at the same time deny the Union an opportunity to inspect records which could very well convince the Union that a change in its position might be warranted.

Finally, I am also not convinced that Respondent's refusal to meet further was motivated by its alleged belief that an impasse had been reached in bargaining. Schiff testified that Respondent came to that conclusion that an impasse existed because of the filing of the petition, plus the Union's strike notice. When it was pointed out that the strike notice had been lifted, Schiff relied exclusively on the existence of the petition as a justification for its assertion of the existence of an impasse. Further, when the Union asked for additional sessions, Respondent refused, solely on the grounds of the petition. It is highly significant, that at no time did the Respondent ever make the assertion either to the Union or to the mediator that it believed that an impasse had been reached, or that the existence of an impasse was responsible for Respondent's decision not to continue bargaining.

In these circumstances, I am not persuaded that Respondent has met its burden of demonstrating that the alleged existence of an impasse motivated its decision to refuse to meet with the Union. On the contrary, it appears that its actions were motivated primarily by the filing of the RD petition. This conclusion is fortified by Schiff's testimony in this regard that, ''there might be an election.''

It is of course clear that the filing of a decertification petition, standing alone, is not a sufficient basis to refuse to meet with the Union. *Champ Corp.*, 291 NLRB 803, 877 (1988); *Dresser Industries*, 264 NLRB 1088, 1089 (1982).

Accordingly, based on the foregoing analysis, I conclude that Respondent has not demonstrated either the existence of a valid impasse or that it relied on such an impasse in its decision to refuse to meet further with the Union. Therefore, Respondent has violated Section 8(a)(1) and (5) of the Act by engaging in such conduct. I so find.[11]

[11] In view of these findings, I find it unnecessary to decide whether Respondent would have established the existence of an impasse under the criteria of *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968), absent its bad-faith refusals to supply information. However, I would observe that it is doubtful that Respondent has met even that burden, in view of the Union's actions in modifying its proposals, indicating a willingness to compromise, *Union Terminal Warehouse*, 286 NLRB 851, 858 (1987), the relatively limited discussions at only three bargaining sessions, *Powell Electrical Mfg. Co.*, 287 NLRB 969 (1987), *Stephenson-Yost Steel*, 294 NLRB 395 (1989), the willingness of the Union to utilize the services of a mediator, *Powell*, supra, and the fact that at no time did either party indicate that it felt the parties were at impasse or that no further bargaining would be fruitful. *Huck Mfg. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1983).

V. THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action necessary to effectuate the purposes and policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent, New Associates d/b/a Hospitality Care Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, 115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been and continues to be the exclusive representative of the employees of Respondent for the purposes of collective bargaining under Section 9(a) of the Act, in the following appropriate unit:

> All employees excluding registered nurses, supervisors, watchmen, office employees, clerical workers, first cooks, dieticians, telephone operators, professional employees, guards and recreational employees.

4. By failing, since April 1990, to notify the Union of the names of all new employees hired into the unit, as required by the collective-bargaining agreement between the parties, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By refusing on and after May 1, 1990, to furnish the Union relevant information, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By failing and refusing on and after September 1990, to permit an audit of its financial records, and to supply information related thereto Respondent has violated Section 8(a)(1) and (5) of the Act.

7. By failing and refusing to meet and bargain with the Union since September 1990, Respondent violated Section 8(a)(1) and (5) of the Act.

8. The allegations in the complaint with respect to Respondent's failure to make contributions to the Union's funds shall be deferred to the parties' arbitration procedures.

9. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, New Associates d/b/a Hospitality Care Center, Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing to notify the Union of the names of all new employees hired into the unit, as required by the collective-bargaining agreement between the parties.

(b) Refusing to bargain collectively with the Union by failing to refuse to supply the Union with information relevant and necessary to collective-bargaining or failing and refusing to permit the Union to audit its financial records, in order to substantiate Respondent's claim of inability to pay.

(c) Refusing to meet and bargain with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union with the names of all new employees hired into the unit since April 1990.

(b) On request, furnish the Union with an up-to-date list of all employees in the unit, along with their current home addresses, dates of hire, categories, and wage rates.

(c) On request, furnish the Union Respondent's audited financial statements and permit the Union to conduct an audit of its financial records in order to verify Respondent's claim of inability to pay.

(d) On request, meet and bargain with the Union in good faith and, if an understanding is reached, embody such an understanding in a written agreement.

(e) Post at its facility located in Newark, New Jersey, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the allegations in the complaint pertaining to the Respondent's failure to make fund contributions on behalf of certain employees, shall be dismissed: jurisdiction of these allegations is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of the Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to notify the Union of the names of all new employees hired into the unit, as required by the collective-bargaining agreement between us and the Union.

WE WILL NOT refuse to bargain collectively with the Union by failing or refusing to supply the Union with information relevant and necessary to collective bargaining or by failing and refusing to permit the Union to audit our financial records, in order to substantiate our claim of inability to pay.

WE WILL NOT refuse to meet and bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with the names of all new employees hired into the unit since April 1990.

WE WILL, on request, furnish the Union with an up-to-date list of all employees in the unit, along with their current home addresses, dates of hire, categories, and wage rates.

WE WILL, on request, furnish the Union our audited financial statements and permit the Union to conduct an audit of our financial records in order to verify our claim of inability to pay.

WE WILL, on request, meet and bargain with the Union in good faith and, if an understanding is reached, embody such an understanding in a written agreement.

NEW ASSOCIATES D/B/A HOSPITALITY CARE CENTER

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adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''